

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE KROGER CO., : Case No.: C-1-02-439
: :
Plaintiff, : Beckwith, J.
: : Sherman, M.J.
: :
v. : **PLAINTIFF'S ANSWER TO AMENDED**
: **COUNTERCLAIMS**
: :
MALEASE FOODS CORP., :
: :
Defendant. : :

Plaintiff The Kroger Co. answers the amended counterclaims of Defendant Malease Foods Corp. as follows:

FIRST DEFENSE

1. Plaintiff The Kroger Co. incorporates its entire Complaint by reference.
2. Plaintiff The Kroger Co. admits the allegations in paragraph 18 of the Counterclaim.
3. With respect to paragraph 19 of the Counterclaim, Plaintiff The Kroger Co. states that the documents referenced therein speak for themselves and therefore, to the extent that the allegations are inconsistent with the plain meaning of the documents, those allegations are denied.
4. With respect to paragraph 20 of the Counterclaim, Plaintiff The Kroger Co. states that the documents referenced therein speak for themselves and therefore, to the extent that the allegations are inconsistent with the plain meaning of the documents, those allegations are denied.
5. Plaintiff The Kroger Co. admits the allegations made in the Complaint pertinent to paragraph 21 and denies the balance of the allegations in paragraph 21 of the Counterclaim.

6. Plaintiff The Kroger Co. denies the allegations in paragraph 22 of the Counterclaim.
7. Plaintiff The Kroger Co. admits the allegations made in the Complaint pertinent to paragraph 23 and denies the balance of the allegations in paragraph 23 of the Counterclaim.
8. Plaintiff The Kroger Co. admits the allegations made in the Complaint pertinent to paragraph 24 and denies the balance of the allegations in paragraph 24 of the Counterclaim.
9. Plaintiff The Kroger Co. denies the allegations in paragraph 25 of the Counterclaim.
10. Plaintiff The Kroger Co. denies the allegations in paragraph 26 of the Counterclaim.
11. Plaintiff The Kroger Co. denies the allegations in paragraph 27 of the Counterclaim.
12. With respect to paragraph 28 of the Counterclaim, Plaintiff The Kroger Co. states that the documents referenced therein speak for themselves and therefore, to the extent that the allegations are inconsistent with the plain meaning of the documents, those allegations are denied.
13. With respect to paragraph 29 of the Counterclaim, Plaintiff The Kroger Co. states that the documents referenced therein speak for themselves and therefore, to the extent that the allegations are inconsistent with the plain meaning of the documents, those allegations are denied.
14. With respect to paragraph 30 of the Counterclaim, Plaintiff The Kroger Co. states that the documents referenced therein speak for themselves and therefore, to the extent that the allegations are inconsistent with the plain meaning of the documents, those allegations are denied.
15. Plaintiff The Kroger Co. admits the allegations in paragraph 31 of the Counterclaim.
16. Plaintiff The Kroger Co. denies the allegations in paragraph 32 of the Counterclaim.

17. With respect to paragraph 33 of the Counterclaim, Plaintiff The Kroger Co. incorporates its answers contained in paragraphs 1 through 16 herein by reference.
18. Plaintiff The Kroger Co. denies the allegations in paragraph 34 of the Counterclaim.
19. Plaintiff The Kroger Co. denies the allegations in paragraph 35 of the Counterclaim.
20. Plaintiff The Kroger Co. denies the allegations in paragraph 36 of the Counterclaim.
21. Plaintiff The Kroger Co. denies the allegations in paragraph 37 of the Counterclaim.
22. With respect to paragraph 30 of the Counterclaim, Plaintiff The Kroger Co. incorporates its answers contained in paragraphs 1 through 21 herein by reference.
23. Plaintiff The Kroger Co. denies the allegations in paragraph 39 of the Counterclaim.
24. Plaintiff The Kroger Co. denies the allegations in paragraph 40 of the Counterclaim.
25. Plaintiff The Kroger Co. denies the allegations in paragraph 41 of the Counterclaim.
26. With respect to paragraph 42 of the Counterclaim, Plaintiff The Kroger Co. incorporates its answers contained in paragraphs 1 through 25 herein by reference.
27. Plaintiff The Kroger Co. denies the allegations in paragraph 43 of the Counterclaim.
28. Plaintiff The Kroger Co. denies the allegations in paragraph 44 of the Counterclaim.

First Affirmative Defense

1. Malease neither sought nor obtained leave to amend its counterclaims, and as such, the amended counterclaims should be stricken.

Second Affirmative Defense

2. Declaratory judgment is not a proper remedy as a counterclaim in an action for damages.

Third Affirmative Defense

3. Defendant Malease waived any rights it may have had relative to the determination of the fair market price of the three Sites referenced in the Counterclaim under Section 3(a) of the Two-Party Agreements between Balkhouse Associates and Malease, and Kroger owned the rights held by Balkhouse Associates.

Fourth Affirmative Defense

4. The purchase options referenced in the Counterclaim are valid, the exercise of those purchase options are valid, and the sale of Balkhouse Associates interests to Kroger are valid, thus, there is nothing for the Court to rescind and nothing for the Court to declare.

Fifth Affirmative Defense

5. Defendant Malease has failed to state a claim with a remedy at law.

Sixth Affirmative Defense

6. Defendant Malease has any claims barred by the doctrine of estoppel.

Seventh Affirmative Defense

7. Defendant Malease has any claims barred by the defense of laches.

Eighth Affirmative Defense

8. Defendant Malease is barred from presenting parole evidence and is subject to the Statute of Frauds, and therefore, has no basis for its claims.

Ninth Affirmative Defense

9. Plaintiff The Kroger Co. reserves the right to assert any additional affirmative defenses as discovery provides.

Respectfully submitted,

/s/ Douglas R. Dennis
Scott D. Phillips (0043654)
Trial Attorney for Plaintiff
FROST BROWN TODD LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6983

OF COUNSEL:

Douglas R. Dennis (0065706)
FROST BROWN TODD LLP
2200 PNC Center
201 E. Fifth Street
Cincinnati, OH 45202
(513) 651-6727

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2003, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and copies will be mailed via U.S. mail to those parties who are not served via the Court's electronic filing system. Parties may access this filing through the Court's system.

Gary R. Winters, Esq.
McCaslin, Imbus & McCaslin
900 Provident Bank Building
632 Vine Street
Cincinnati, OH 45202-2442

Robert W. Cinque, Esq.
Cinque & Cinque
845 3rd Avenue, Suite 1400
New York, NY 10022

/s/ Douglas R. Dennis